

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)
)
Advanced Television Systems) MB Docket No. 87-268
And Their Impact upon the Existing)
Television Broadcast Service)
)

To: The Secretary

COMMENTS OF KEVN, INC.

KEVN, Inc. ("Licensee"), licensee of FOX affiliate KEVN-TV, NTSC Channel 7, and permittee of KEVN-DT, DTV Channel 18, Rapid City, South Dakota ("KEVN"); and licensee of television satellite station KIVV-TV, NTSC Channel 5, and permittee of KIVV-DT, DTV Channel 29, Lead, South Dakota ("KIVV," and, together with KEVN, the "Stations"), respectfully files these limited Comments concerning the proposed DTV Table of Allotments. 1/

In the *Seventh FNPRM*, the Commission arbitrarily limited requests for alternative channel assignments prior to finalization of the DTV Table of Allotments to four narrow categories. 2/ Licensee respectfully submits that its unique circumstances, regarding which it previously has sought – but not yet received – guidance from the Commission, warrant modification of the proposed allotments for the Stations prior to the finalization of the DTV

1/ *Seventh Further Notice of Proposed Rulemaking*, "Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service," MB Dkt. No. 87-268, FCC 06-150 (rel. Oct. 20, 2006) ("*Seventh FNPRM*"). These Comments are timely filed pursuant to *Public Notice*, "Order Granting Extension of Time for Filing Comments and Reply Comments," DA 07-38, (rel. Jan. 9, 2007).

2/ See *Seventh FNPRM* at paragraph 25.

Table of Allotments. ^{3/} Specifically, Licensee reiterates its request that KEVN be permitted to substitute its current analog Channel 7 for its assigned DTV Channel 18 for permanent digital operation. This would require an extremely narrow expansion of the criteria set forth in Paragraph 25 of the *Seventh FNPRM*. Namely, where a licensee has previously requested to remain on its existing analog channel due to unique financial considerations arising out of a bankruptcy proceeding and the Commission has failed to respond prior to issuance of the *Seventh FNPRM*, the DTV Table of Allotments would be amended without further delay to accommodate the request. Failure to do so would have *severe* adverse consequences on the public interest as shown herein, while doing so would not create *any* adverse consequences since it is unlikely that many other licensees, if any at all, face the same set of circumstances. This limited request cries out for a positive and timely response from an agency that has failed to respond in any way to three previous requests filed by Licensee going back to May 2005.

I. Background

In several previous submissions seeking guidance from the Commission, Licensee has explained that severe financial constraints render it incapable of constructing “full, authorized facilities” for KEVN as specified in its “Pre-Election Certification Form” on FCC Form 381 (FCC File No. BCERCT-20041105AYE) and “Digital Channel Election Form First Round Election” on FCC Form 382 (FCC File No. BFRECT-20050210APB). ^{4/} In the Petition,

^{3/} See Petition for Relief Seeking Extension of the July 1, 2006 Interim Digital Construction Deadline,” filed on May 13, 2005 (the “Petition”), as supplemented on August 19, 2005 (the “Supplement”), and as further supplemented on July 7, 2006 (the “Further Supplement”). By separate letter notification, Licensee has advised the Commission of its intent to “flash-cut” full digital facilities for KIVV at the end of the transition period. See Letter to Marlene H. Dortch, Secretary, dated July 7, 2006, MB Docket No. 03-15. Copies of Licensee’s pending submissions are attached hereto.

^{4/} *Id.*

Supplement, and Further Supplement, Licensee demonstrated that KEVN was unable to satisfy the build-out milestone associated with digital operation on DTV Channel 18 due to severe financial constraints imposed on Licensee in connection with proceedings before the United States Bankruptcy Court for the District of South Dakota. While Licensee continues to work diligently to return the Stations to financial viability, the Stations remain in critical condition due to restrictions imposed on Licensee by its principal creditor and the court-approved plan of reorganization.

As described in the Petition, Supplement, and Further Supplement, between August 2001 and June 2003, Licensee spent approximately \$375,000 to enable the Stations to broadcast digitally at low power on their DTV channels in order to meet the Commission's deadline for commercial television stations to construct digital facilities. But the very expenditures related to KEVN's and KIVV's digital build-out and launch of digital operations caused Licensee significant financial distress and, ultimately, required it to seek bankruptcy protection.

As explained in the Further Supplement, Licensee's financial resources for engineering consultation and analysis were severely limited by its obligation to operate in accordance with a budget filed with the bankruptcy court. In order to meet the Commission's filing deadlines, and without the financial resources to undertake additional, more sophisticated analysis, Licensee had no choice but to rely upon an initial engineering consultation recommending that Licensee select KEVN's assigned DTV channel for post-transition operation.

Licensee ultimately discovered that this was a grave error. In the course of obtaining proposals to upgrade its current STA digital facilities to full, authorized digital facilities, Licensee learned of the costly ramifications of electing DTV Channel 18 for post

transition operation. As explained in the Further Supplement, Licensee determined that the capital costs associated with the build-out of KEVN to full facilities on DTV Channel 18 will be forty percent higher than a build-out on its current NTSC Channel 7. In the Further Supplement, Licensee noted that a digital UHF transmitter alone will cost approximately \$375,000, whereas digital VHF transmitters are available for approximately \$200,000. In addition, Licensee will be required to incur approximately \$90,000 in antenna and transmission line expense that would have been obviated had it elected to conduct permanent digital operations on Channel 7. Furthermore, Licensee has learned that the larger UHF transmitter necessary for post-transition operation on DTV Channel 18 may require the construction of an addition to KEVN's transmitter facility, whereas a new VHF transmitter would fit within the facility's existing space. Altogether, Licensee estimates that it could avoid nearly \$500,000 in capital expense if it were able to use its current NTSC Channel 7 for KEVN's post-transition operations rather than its assigned DTV Channel 18. For a small market station that has been in financial peril such a difference is critical.

In addition, Licensee has determined that the ongoing operating expense on NTSC Channel 7 would be significantly less than on DTV Channel 18 because the VHF solution would be far more efficient, minimizing energy consumption and reducing power costs. ^{5/} For a station struggling to survive, even the more limited cost of constructing full facilities on NTSC Channel 7 would be a challenge; meanwhile, the increased financial burden of constructing full facilities at this time on DTV Channel 18 could be fatal.

^{5/} As Licensee explained in the Further Supplement, the UHF transmitter for DTV Channel 18 will require 25 kW of power to operate, whereas the VHF transmitter for NTSC Channel 7 would require only 3 kW, resulting in additional power costs at rates of approximately \$40,000 annually (based on 2005 energy rates).

Furthermore, as described in the Petition, Supplement, and Further Supplement, Licensee now is operating under a court-approved plan of reorganization 6/, which obligates Licensee to remit the vast majority of its excess cash flow to its principal creditor and earmarks additional funds for the repayment of general creditors, and thereby severely limit the funds available for completing the build-out of KEVN to full facilities.

II. The Modification Would Serve the Public Interest

The modification of the DTV Table of Allotments requested herein, and the relief sought in the Petition, Supplement, and Further Supplement, would enable Licensee to continue to serve viewers in its communities as it strives to satisfy the terms of the reorganization plan approved by the bankruptcy court, without disrupting the ultimate transition to digital television in the Rapid City market.

Shifting resources within Licensee's severely constrained budget in order to fund additional digital construction at this time would clearly be contrary to the public interest. For example, as KEVN noted in its Further Supplement, KEVN currently produces highly-rated local newscasts twice daily and a regularly scheduled local public affairs program. This local public-interest programming would have to be curtailed, or eliminated altogether, if the Licensee is forced to undertake the construction necessary to build out KEVN's digital operations on DTV Channel 18, as designated in the DTV Table of Allotments.

Furthermore, as described in the Further Petition, further engineering analysis conducted for the Licensee now indicates that the preferred full facilities build-out configuration on DTV Channel 18 is likely to necessitate top-mounting KEVN's digital antenna on its existing

6/ Licensee's reorganization plan, dated March 15, 2005, was approved by the Court in *In re: KEVN, Inc.* (File No. 03-50592), *Order of Final Decree*, a copy of which was submitted with the Petition.

tower and dismounting and relocating the existing NTSC Channel 7 antenna to a lower tower position, with a resulting loss in existing analog FOX network service. Reconfiguring the KEVN NTSC and DTV facilities in this manner prior to the end of the digital transition would contravene established Commission policy because it would create an analog loss area and a FOX network white area. Particularly in the small Rapid City market, where digital set penetration is low, this would likely have the effect of depriving a substantial number of viewers of free over-the-air service, thereby creating a serious fall-out among many viewers. Absent the requested relief, Licensee will have to modify its pending construction permit for its DTV Channel 18 facilities in order to adjust the Station's power and antenna height (placing the new antenna at the top position currently being used for analog operation) and then will not be able to achieve full replication.

Finally, grant of the relief sought under the Petition, the Supplement, and the Further Supplement will ensure comity with the bankruptcy laws while not creating any troubling precedent for the Commission. ^{7/} The requested relief is limited to a small-market licensee with an established record of local news and community service struggling to survive following bankruptcy and to maintain its high level of service to its community.

KEVN, Inc. therefore renews its three previous requests that the Commission:

- Amend the proposed DTV Table of Allotments and authorize Licensee to amend its digital channel election for KEVN-DT to specify its current NTSC Channel 7 in lieu of its assigned DTV Channel 18;
- Continue to allow KEVN to defer build-out of higher power facilities until the February 17, 2009 transition deadline; and

^{7/} See, e.g., *San Diego Television, Inc., Debtor-in-Possession*, 11 FCC Rcd 14689 (1996), at ¶ 13 (Commission is "cognizant of [its] obligations under its public interest mandate to consider the national policy underlying other federal laws" such as the bankruptcy laws, citing *LaRose v. FCC*, 494 F.2d 1145, 1146 (D.C. Cir. 1974)).

- Allow Licensee additional time to file modification applications for both KEVN and KIVV for their final DTV facilities. 8/

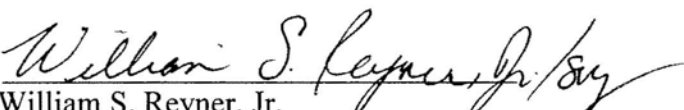
This unique case merits the Commission's attention prior to the finalization of the DTV Table of Allotments.

Respectfully submitted,

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By: 
William S. Reyner, Jr.
President

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8/ Given that satellite station KIVV is used to complement and enhance KEVN's coverage of the Rapid City DMA, it would be premature and a waste of both Licensee and Commission resources to perform the analyses necessary to determine the tower and antenna configurations necessary to achieve appropriate coverage by KIVV until Licensee is able to establish the service contours for KEVN on either Channel 18 or Channel 7, subject, in turn, to further guidance from the Commission.